IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 105 of 2005
With
CIVIL APPLICATION No. 4062 of 2005
In SECOND APPEAL No. 105 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE K.M.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ? **-Yes.**

2 To be referred to the Reporter or not ? **-No.**

3 Whether their Lordships wish to see the fair copy of the judgment ? **-No.**

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? **-No.**

5 Whether it is to be circulated to the civil judge ? **-No.**

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STATE OF GUJARAT - Appellant(s)
Versus
VIKRAM KANTILAL PAREKH - Defendant(s)

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Appearance :
GOVERNMENT PLEADER for Appellant(s) : 1,
NOTICE SERVED for Defendant(s) : 1,
MS RUKHSANA M PATHAN for Defendant(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE K.M.MEHTA

Date : 28/03/2006

ORAL JUDGMENT

1.The State of Gujarat, through the Secretary filed this

Second Appeal under Section 100 of the Civil Procedure Code against the judgment and decree dated 28/1/2005 passed by the 3rd Extra Assistant Judge, Junagadh in Regular Civil Appeal No.77 of 2004. By the impugned judgment, the learned Judge was pleased to confirm the judgment and decree dated 4/5/2004 passed by the Second Joint Civil Judge (S.D.), Junagadh in Regular Civil Suit No.32 of 2001 filed by Vikram Kantilal Parekh.

2. Heard Ms.P.B.Sheth, learned AGP for the State, appellant and Ms.Rukhsana Pathan, learned advocate on behalf of the respondent.

3. As this Court has already issued notice on 8/7/2005, pursuant to that notice, Ms.Rukhsana Pathan appears. The facts giving rise to this appeal are as under:

3.1) Shri Vikram Kantilal Parekh has filed suit being Regular Civil Suit No.32 of 2001 on the ground that plaintiff's father Kantilal Maharanidas Parekh was serving as Store-Keeper in the office of Executive Engineer, Salinity Control Division, Junagadh which department is under the control, administration and supervision of he defendant-department. It is the case

of the plaintiff that his father has expired on 13/5/1981 during his Government services. It is stated that at the time of death of plaintiff's father, age of the plaintiff was about 2 years and 9 months and thus, plaintiff and his mother put into miserable condition as only bread winner of family died. Plaintiff's mother Ushaben has made an application for compassionate appointment. However, the authority by the communication dated 9/10/2000, rejected the proposal of the plaintiff for the compassionate appointment on technical ground.

4. Being aggrieved and dissatisfied with the said, the plaintiff has filed the suit challenging the said order in this behalf. The defendant as filed written statement vide Exh.21 and contested this. Both the parties have lead documentary and oral evidence. The learned Judge by order dated 4/5/2004, held that:

“4.1) The plaintiff's suit is hereby partly decreed.

4.2) It is hereby ordered and decreed that impugned order dated 9/10/2000 passed by the defendant vide Exh.62 rejecting the plaintiff's proposal for

compassionate appointment is illegal, against the Government Circulars and against the principles of natural justice and therefore, it is null and void.

4.3) It is further ordered that plaintiff is entitled to get suitable appointment as dependent on compassionate ground as per the educational qualification and eligibility and therefore, defendant is directed to give suitable appointment to the plaintiff on compassionate ground within two months from the date of receipt of this order and also directed to communicate the decision arrived at by the authority to the present plaintiff without any delay.

4.4) So far as the relief prayed for by the plaintiff in Sub-Para-4 of Para-4 of the plaint is concerned for prohibitory injunction is hereby rejected."

5. Being aggrieved and dissatisfied with the said order, the State Government has filed an Appeal before the 3rd Extra Assistant Judge, Junagadh. The said appeal was filed on 11/8/2004. The learned 3rd Extra Assistant Judge, Junagadh by his judgment and decree dated 28/1/2005 in Regular Civil Appeal No.77 of 2004 pleased

to dismiss the said appeal and confirm the judgment and decree of the learned Trial Court.

6. Being aggrieved and dissatisfied with the said judgment, the State Government has filed Second Appeal on 7/4/2005 before this Court. With consent of parties, matter is taken up for final hearing/disposal.

7. On behalf of the State Government, the learned AGP has stated that in this case, the Trial Court decreed the suit and held that the order dated 9/10/2000 passed by the defendant rejecting the plaintiff's proposal for compassionate appointment is illegal against the Government Circulars and against the principles of natural justice and thereafter ordered that plaintiff is entitled to get suitable appointment as dependent on compassionate ground as per the educational qualification and eligibility and therefore, defendant is directed to give suitable appointment to the plaintiff on compassionate ground within two months from the date of receipt of the order and also directed to communicate the decision arrived at by the authority to the present plaintiff without any delay. The said order was passed on 4/5/2004 and thereafter, when the

appeal is filed by the State of Gujarat, in the appeal, the learned 3rd Extra Assistant Judge, Junagadh by his judgment and decree dated 28/1/2005 pleased to confirm the judgment and decree passed by the learned Trial Judge.

8. The learned AGP has contended that therefore, the second direction granted by the Trial Court that the plaintiff is entitled to get suitable appointment as dependent on compassionate ground is not legal and valid. At the most, the Court can direct the Government to consider the case of the plaintiff in this behalf. In support of the same she has relied upon the following judgments:

1) Judgment of the Hon'ble Supreme Court in the case of State of Haryana v. Naresh Kumar Bali, reported in (1994) 4 SCC 448.

2) Judgment of the Hon'ble Supreme Court in the case of Pepsu Road Transport Corporation v. Satinder Kumar and another, reported in 1995 Supp. (4) SCC 597.

3) Judgment of the Hon'ble Supreme Court in the case of

Himachal Road Transport Corporation v. Dinesh Kumar, reported in (1996) 4 SCC 560.

4) Judgment of the Hon'ble Supreme Court in the case of Managing Director, MMTC Ltd., New Delhi and another v. Pramoda Devi, reported in (1997) 11 SCC 390.

9. On the other hand, on behalf of the respondent, Ms.Rukhsana Pathan, learned advocate has stated that the order of the Trial Court and the Appellate Court should be confirm and second appeal should be dismissed with a view of the judgment of the Division Bench of this Court in the case of Gujarat Maritime Board v. Kanji Natha Karmata, reported in 2004 (2) GLH 392.

10. I have considered the rival submissions in this behalf. It is no doubt true that in this case, father of the plaintiff expired on 13/5/1981 during his Government service. At the time of death, the plaintiff was only 2 years and 9 months old. The plaintiff and his mother both were put into miserable condition as only bread winner of family died. Plaintiff's mother Ushaben has filed an application for compassionate appointment. However, the authority by the

communication dated 9/10/2000, rejected the proposal of the plaintiff for the compassionate appointment on technical ground i.e. delay. I agree with the Trial Court that order of the authority rejecting the application on the ground of delay is wholly erroneous and the same is to be quashed and set aside. However, as regards further directions is to be given, I first examine the Division Bench judgment of this court and it that case, the facts is that one Kanji Natha Karmata has applied for appointment on compassionate ground as his father having died on 31/10/1970. At that time petitioner was only two months old. Mother of the petitioner applied in the year 1988 to the Port Officer, Gujarat Maritime Board, Veraval. Thereafter, she again applied in April, 1989 followed by another attempt dated 25/3/1988. Ultimately, the petitioner got communication that his request cannot be accepted, having applied after prescribed time limit. Being aggrieved and dissatisfied with the same, the petitioner filed Special Civil Application No.1832 of 1993 seeking direction against the respondents to appoint him on compassionate ground. By the impugned judgment, the learned Single Judge allowed the petition and directed the respondent to appoint the petitioner

on compassionate ground against the first available vacancy under their control anywhere in the State of Gujarat. Being aggrieved and dissatisfied with the same, the Gujarat Maritime Board has field LPA before this Court. In the judgment of the LPA, in para 5 of the judgment, the Division Bench has observed as under:

> “Another facet of the question is whether the petitioner applied late. As stated above, mother of the petitioner applied immediately after the petitioner attained the age of 18 years and followed it by two other communications of April, 1989 and March 1991. In view of these facts, the respondents cannot say that the application was belated. The contention that when the father of the petitioner died, a scheme for appointment on compassionate ground was not existing cannot be accepted for the reason that there is no evidence/suggestion to demonstrate that some other scheme/guidelines did not exist for appointment on compassionate ground. Further, it is not of much significance because the petitioner become entitled to seek such appointment on compassionate ground in and around 1988 and the Rules for

compassionate appointment had come into force in 1979. Consequently, the petitioner could apply and he could be given benefit of compassionate appointment. Last submission that the father of the petitioner was a casual worker, having worked only for three and half years cannot be examined since it has not been raised before the learned Single Judge. Ms.Mandavia submits that it was raised by the appellant in the affidavit-in-reply before the learned Single Judge, cannot be accepted, since it is not mentioned in the judgment. Therefore, it has been raised for the first time. Further, there is no prohibition in the scheme. So, contention is rejected. Therefore, there is no merit in the appeal and same is, therefore rejected with no order as to costs."

11. From the judgment of the Division Bench, there was no such argument that the Court has no power to direct the Government to appoint the person on compassionate ground whereas in the present appeal, the learned AGP has raised this contention specifically and in the judgment in the case of the State of Haryana (supra),

in para 16 at page 453, the Hon'ble Apex Court has observed as under:

> “With regard to appointment on compassionate ground we have set out the law of life Insurance Corporation of India v. Asha Ramchhanda Ambekar. The same principle will clearly apply here. What the High Court failed to note is the post of an Inspector is a promotional post. The issuing a direction to appoint the respondent within three months when direct recruitment is not available, is unsupportable. The High Court could have merely directed consideration of the claim of he respondent in accordance with the rules. It cannot direct appointment. Such a direction does not fall within the scope of mandamus. Judicial review, it has been repeatedly emphasised, is directed against the decision-making process and not against the decision itself; and it is no part of the court's duty to exercise the power of the authorities itself. There is widespread misconception on the scope of interference in judicial review.“

12.It may be noted that in the case of Pepsu Road Transport Corporation (supra), in para 6, the Hon'ble Supreme Court has considered first the order of the High Court and ultimately in the same para, the Hon'ble Supreme Court has observed that Courts cannot ignore this fact and direct that possession of minimum qualification alone would be sufficient. Some direction to the appointing authority as to the choice of the post, taking into account the realities of the employment-market, should be available. Then again it would be erroneous for the courts to compel appointment to particular post. The fact of the matter is that though this kind of appointment is sui generis, and it is reasonable to except that as and when such claims arise a provision should be made for accommodating such claims from out of the posts available for direct recruitment, the corporation is not unreasonable when it suggest that the qualifications for such appointments should broadly be commensurate with the level of candidates who offer themselves for appointment and not merely the minimum qualification. And ultimately, the Hon'ble Supreme Court has set aside the order of the High Court directing the appointment of the respondent and in substitution of the positive

directions issued to the Corporation, the Hon'ble Supreme Court direct the Corporation to consider the case of the respondent for an appointment on compassionate grounds commensurate with his qualifications.

13.Similar direction have been granted in the case of Himachal Road Transport Corporation v. Dinesh Kumar, reported in (1996) 4 SCC 560, particularly para 10 at page 562 and 563 and also in the case of Managing Director, MMTC Ltd., New Delhi and another v. Pramoda Devi, reported in (1997) 11 SCC 390, particularly para 5 at page 393 and 394.

14.In view of the aforesaid judgments of the Hon'ble Apex Court, I am of the view that the judgment of the Trial Court as well as the Appellate Court of granting direction for appointment is to be quashed and set aside.

15.I only give direction to the appellant, State Authority to consider the case of the plaintiff about the compassionate appointment as per the provisions of Rules and Regulations kindly and sympathetically. To

that extent, this Second Appeal is allowed.

16. This Court hope and trust that the authority will take proper action within three months. Second Appeal is disposed of accordingly. Civil Application is also disposed of accordingly.

(K.M.MEHTA, J.)

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